Supreme Court, U.S.
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No. 92-65

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

SUN CARRIERS, INC.; ALBERT L. LABINGER; DONALD E. MAYORAS; MILNE TRUCK LINES; ELLIOTT BURNSIDE; CHARLES N. PASS; THOMAS MORTON; JAMES BRADFORD; ST. JOHNSBURY TRUCKING; JONES TRUCK LINES; RIORDAN FREEMAN & SPOGLI; RICHARD J. RIORDAN; BRADFORD M. FREEMAN; RONALD P. SPOGLI,
Petitioners.

VS.

MILNE EMPLOYEES ASSOCIATION, a non-profit Mutual Benefit Corporation, or in the alternative Steven Bishop, Charles E. Tharp, Debra Bishop and Ella Tharp, as representatives of the class of affected former employees of Milne Truck Lines, Inc., and their spouses,
Respondents.

Petition for Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Respondents' brief in opposition to Milne's petition for writ of certiorari is, in its own right, a reason to grant the petition. Respondents do not dispute several of Milne's major contentions — in particular, that the Ninth Circuit's decision not to preempt fraud claims under Section 301 of the Labor Management Relations Act directly conflicts with analogous decisions from other Circuit Courts of Appeals.

Respondents' brief also demonstrates precisely the confusion Milne predicted this decision will engender. Starting with their "Questions Presented," respondents interpret the Ninth Circuit's decision to exclude any and all individual fraud claims from the reach of Section 301, indeed, to exclude virtually any tort claim. (Respondents' Br. at "Questions Presented," 6.) Respondents would also use this decision to forestall any claim of preemption under principles of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), if an employer has successfully defended before the National Labor Relations Board an unfair labor practice charge related to the same factual event or controversy alleged in a state law suit. (Respondents' Br. at "Questions Presented," 13-16.) These contentions are not merely departures from the authority of this Court, other circuits and the Board, they reveal the patent danger in the Ninth Circuit's decision: it may be used, as respondents clearly do, to undercut longstanding precepts of federal labor law. If not corrected by this Court, the Ninth Circuit's decision will significantly erode the doctrine of preemption under Section 301 and under the principles of *Garmon*, and it will inject more uncertainty and confusion into the body of federal labor law which depends on certainty and clarity to achieve Congress' goal of a uniform and cohesive national labor policy.

I.

THE NINTH CIRCUIT'S DECISION REGARDING SECTION 301 PREEMPTION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEALS.

As set forth in the petition (at 8-11), the Second, Seventh and Eleventh Circuit Courts of Appeals have concluded that resolution of state law fraud claims based on alleged misrepresentations about layoffs, plant closure and job security, such as those alleged here by respondents, requires interpretation of the collective bargaining agreement; accordingly, these courts have found such claims preempted by Section 301. *See e.g., Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986); *Darden v. United States Steel Corp.*, 830 F.2d 1116 (11th Cir. 1987); *Dougherty v. American Telephone & Telegraph Co.*, 902 F.2d 201 (2d Cir. 1990); *Smith v. Colgate-Palmolive Co.*, 943 F.2d 764 (7th Cir. 1991). Respondents simply (and rather remarkably) ignore these decisions from other Circuits, decisions which are factually indistinguishable and which unquestionably conflict with the Ninth Circuit's opinion.

Similarly, respondents fail to acknowledge that other Circuits (as well as this Court) have affirmatively rejected the Ninth Circuit's conclusion that interpretation of a collective bargaining agreement for purposes of Section 301 preemption is limited to the express terms of the collective bargaining agreement. (See Petition at 11-13.) The Ninth Circuit refused to find preemption because the pertinent collective bargaining agreements purportedly did not contain an express term that grants Milne the absolute right to shut down or which forbids Milne from making promises regarding job security. (10a-11a.)[1] As set forth in the petition, however, not only is it clear that the collective bargaining agreements expressly contemplated Milne's absolute right to close and expressly governed Milne's ability to make any individual promises (Petition at 3, 13 n.5), it is equally clear that this Court and other Circuit Courts of Appeals have uniformly rejected the

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[1] "10a-11a" refers to pages 10 and 11 of the appendix attached to the petition for writ of certiorari.

view that the meaning of a collective bargaining agreement is determined by its four corners or is subject to common law contract principles. Rather, a collective bargaining agreement may contain implied terms which reflect the law of the shop, retained rights and custom of the industry, all subject to arbitral, but not judicial, interpretation. (Petition at 11-14.)

Instead of addressing these patent conflicts in the law which the Ninth Circuit's decision creates, respondents simply argue that the Ninth Circuit is "correct" (Respondents' Br. at 4-8), and that because the decision is supposedly "correct," the case presents no issue of importance. (Respondents' Br. at 9-12.) At this juncture, of course, whether the Ninth Circuit is "correct" is immaterial; the fact remains that a direct split in the Circuits exists on critical and recurring issues of federal labor law.

At any rate, respondents' assertion that the Ninth Circuit's decision is not important is belied by their own opposition brief. Respondents attempt to minimize the decision's import by virtue of purportedly "unique facts," yet neither the Ninth Circuit nor respondents ever identify the "unique" facts which would narrow its impact or which would distinguish this case from *Mason, Dougherty, Darden* or *Smith*. In fact, there are none.

Moreover, it is quite clear that respondents do not themselves minimize the importance of the Ninth Circuit's decision and unabashedly rely on it to assert that no fraud claim based on alleged individual promises to employees, and indeed, no tort claim (except perhaps one directly based on contract) is pre-empted by Section 301. (Respondents' Br. at 6.) Similarly, respondents would rely on the decision to mandate that any "interpretation" of a collective bargaining agreement for purposes of Section 301 preemption be limited to only the express terms of the collective bargaining agreement. (Respondents Br. at 3.) Rather than a ruling confined to "unique facts," the decision, by respondents' own admissions, necessarily will affect many kinds of employment controversies which have long been subject to grievance and arbitration.

Respondents' preoccupation with the "state law" source of their tort ignores the fact that resolution of a tort whose nature is

defined by state law may nonetheless involve interpretation of a collective bargaining agreement.[2] *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). Challenges to drug testing based on state law privacy rights are perhaps the most analytically analogous to the instant fraud claims. Despite the state law basis of the right of privacy, courts have repeatedly held that an employee's reasonable expectations of privacy are a function of the powers and duties specified in the collective bargaining agreement and that state law privacy claims are, accordingly, preempted. *See e.g. Laws v. Calmat*, 852 F.2d 430 (9th Cir. 1988); *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987). The result — preemption of the state law claims — has been the same whether or not an "express" term governed the challenged practice. *See e.g. Laws*, 852 F.2d at 433.

For example, in a recent Seventh Circuit case, *In Re AMOCO Petroleum Additives Co.*, 964 F.2d 706 (7th Cir. 1992), plaintiffs, union employees covered by a collective bargaining agreement, filed suit in state court for invasion of privacy because the employer, who suspected employee misconduct, videotaped employees entering and exiting a locker room. *Id.* at 707. Following removal, the district court eventually remanded the case. The Seventh Circuit exercised its rarely used power to reverse the order of remand, based on a finding that the employees' state law privacy claims were artfully pleaded claims under Section 301. The employer argued that the collective bargaining agreement implicitly granted it the authority to conduct surveillance of its employees either by industry custom or by a reservation in the management's rights clause. *Id.* at 709. Judge Easterbrook, writing for the Seventh Circuit, did *not* (unlike the Ninth Circuit) interpret the contract to determine whether or not it could be construed in the manner suggested by the employer; instead he recognized that interpretation of a contract was in the first

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[2]Again, respondents ignore another split in the Circuits: the Second and Eleventh Circuits, contrary to the Ninth Circuit, conclude that an employer's duty to disclose an intent to lay off employees is not a function of state law but of contractual agreement with the union. *Darden*, 830 F.2d at 1120; *Dougherty*, 902 F.2d at 203-204.

instance for the arbitrator, and concluded, accordingly, that the state law privacy claims were preempted by Section 301:

> "Plaintiffs concede that a collective bargaining agreement could authorize surveillance but observe that there is not one word in the compact about cameras, locker rooms, or surveillance in general. Amoco does not find this surprising, because on its view the subject is covered by the management-rights language. As Amoco sees things, everything that is neither regulated nor forbidden by the collective bargaining agreement is committed to its discretion by this residual clause. Thus, resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, which transmutes state to federal law."
>
> * * *
>
> "Privacy in the workplace . . . is an ordinary subject of bargaining. The extent of privacy is a "condition" of employment. Even agreements that do not mention surveillance expressly may deal with the subject by implication. If Amoco were to discipline [the plaintiffs], the union could file a grievance and take the complaint to arbitration. An arbitrator, we doubt not, could overturn any discipline if he believed the surveillance unjustified. Damages remedies under state law would disrupt this process of accommodation and interpretation." *Id.* at 709-710.

A fraud claim depends on an employee's reasonable expectations no less than the right of privacy. Indeed, as the Ninth Circuit found, justifiable reliance is one of the essential elements of a fraud claim (9a-10a). A union employee cannot claim reasonable reliance on alleged individual promises regarding terms and conditions of employment such as job security, layoff, and continued plant operations without comparing the alleged promises with the terms and conditions of his employment set forth in the collective bargaining agreement. Moreover, if the alleged promises and collective bargaining agreement conflict, "in any way" the promises are, by the express terms of *this* collective bargaining agreement, unenforceable. (Petition at 6.) There is no

way to determine if conflict exists without interpreting the collective bargaining agreement's treatment of job security and plant closure, including rights and duties dictated by implication or custom. Other Circuit Courts of Appeals recognize and accept these principles; the Ninth Circuit rejects them. In short, the Circuits are in sharp disagreement as to whether the collective bargaining agreement or state law determines the resolution of fraud claims based on alleged individual promises regarding terms and conditions of employment. Respondents' silence does not suggest otherwise.

II.

THE NINTH CIRCUIT'S DECISION THAT RESPONDENTS' CLAIMS ARE NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT IS IN CONFLICT WITH AUTHORITY FROM THIS COURT, OTHER CIRCUIT COURTS OF APPEALS AND THE BOARD.

As set forth in the petition, at the center of respondents' complaint is the allegation that Milne waited some nine months before announcing its "secret" plan to close the plant. In the interim, Milne allegedly misled employees into thinking the plant would remain in operation and that their job security was assured. According to the express allegations in respondents' complaint, by the time Milne announced the closure, there was "no time" for the union to respond before the shutdown. (Petition at 5, 20 n.8.) Under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (the "Act"), Milne had a duty to notify the union at a "meaningful time" (i.e., close to the time of decision) and in a meaningful manner (i.e., truthfully, to the union, not fraudulently, to employees), if it was to meet its obligation to bargain in good faith over the effects of closure. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981). Respondents' allegations could not state more precisely conduct which, if true, would be not merely arguably, but unquestionably, prohibited by the Act.

Both respondents and the Ninth Circuit treat this contention in a surprisingly cursory fashion — the decision simply notes that since the Board dismissed the union's charges of bad faith

bargaining over the plant closure, the Board "implied" that Milne met its effects bargaining obligations, and Milne's conduct thus is not prohibited by the Act. (21a.) Respondents take the Ninth Circuit's conclusion one step further and argue that whenever an employer successfully defends an unfair labor practice charge before the Board, that employer cannot then claim preemption under principles of *Garmon* if the employer is sued for conduct "arising from the same factual setting as that which gave rise to the NLRB complaint." (Respondents' Br. at "Questions Presented," 13-17.)

The Ninth Circuit's position and the gloss put on the decision by respondents simply turns *Garmon* preemption on its proverbial head. If a union employee pursues a charge before the Board on a claim that he was fired for union activity, and the Board dismisses the charge on the merits, under the Ninth Circuit's position, the dismissal would serve as evidence that the Board found the alleged conduct "not prohibited" by the Act; the employee could then sue for wrongful discharge in state court without the threat of preemption under *Garmon*. This is not the result intended by *Garmon*, and case authority is wholly contrary. (See Petition at 22 n.9.) Yet, intentionally or not, that is precisely what the Ninth Circuit encourages in its decision, as evidenced by respondents' brief.

Garmon preemption is not dependent on what was presented to the Board or even if anything was presented to the Board at all; rather, it depends on what "could be" presented to the Board. *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 197 (1978). The issue is whether the allegations as set forth in the complaint allege conduct arguably prohibited or protected by the Act, regardless of the history of some different charge of unfair labor practice put before the Board. The Board's ultimate disposition on the merits of any particular set of facts is immaterial to a determination of the Board's jurisdiction over alleged conduct.

Moreover, respondents have consistently (and correctly) urged that their allegations in the state law claims are *different* than those that were before the Board. (Respondents' Br. at 15-16.) The Board's prior disposition of an entirely different set of facts on the merits cannot determine its jurisdiction over another, different

controversy. And if the claims in the court and Board action were the same, the state law action would likewise be barred. *See Parker v. Connors Steel Co.*, 855 F.2d at 1510, 1517 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989) ("the primary jurisdiction rationale has the greatest validity when a party has sought redress for his claims from the NLRB and in the face of an adverse decision, the claims are restructured as state law claims and pursued in state court"). Otherwise, under the Ninth Circuit's view, as adopted by respondents, the preemptive effect of *Garmon* is lost, and the test becomes simply one of exhaustion of remedies. A claimant would need only file a charge before the Board, and lose, either intentionally or unintentionally, and then pursue the same claim in state court. Such a result does nothing to preserve the Board's jurisdiction over allegations of conduct arguably prohibited or protected by the Act and presents employers with a Hobson's choice: launch a successful defense to a charge of unfair labor practice before the Board and run the risk of a suit in state court on the Ninth Circuit's new-found theory that the employer's conduct was "not prohibited" by the Act.[3] This Court should not countenance such a radical departure from the principles established in *Garmon*.

Respondents simply ignore the Ninth Circuit's departure from authority which establishes that intentional delay in giving notice of a plan to close the plant, and deceit of employees and their

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[3]The confusion presented by the Ninth Circuit's decision pervades respondents' discussion of *Garmon* preemption criteria. Respondents drift back and forth between what was actually presented to the Board by the unions in this case and what is alleged in the complaint herein, suggesting that since the two controversies are not identical, there can be no preemption. "Here, the NLRB was presented with an entirely different controversy for *Garmon* purposes than MEA alleged in its state complaint. . . . The Ninth Circuit thus properly found that Garmon does not preempt here because the complaint raises issues not identical to the controversy the NLRB decided." (Respondent's Br. at 15-16.) As discussed above, the issue, of course, is not what was presented to the Board; otherwise oversight by the union or charging party could give rise to a state law suit for what was "omitted" despite the fact that what was omitted was clearly a controversy within the Board's jurisdiction.

union about plant closure are precisely the claims which give rise to an unfair labor practice charge for bad faith effects bargaining under *First National Maintenance. See, e.g., Chippewa Motor Freight, Inc.*, 261 N.L.R.B. 455, 459-60 (1982) (fact that employer had not deceived union or employees about its decision to close, had not made its decision substantially in advance of its notice, and had discussed its financial difficulties with union rendered two day notice timely pursuant to effects bargaining obligations). It is not merely "arguable," it is clear, in fact, that the Board would entertain charges that the employer deceived the union and employees about a decision to close, that it withheld its true intentions for too long a time and thereby failed to meet its effects bargaining obligations in good faith. Respondents' failure to acknowledge, or perhaps, to perceive, conflicting authority from the Board and federal courts and respondents' patent subversion of the *Garmon* test for preemption, based as it is on the Ninth Circuit's decision, underscore the need for this Court's intervention.

In their brief, respondents, like the Ninth Circuit, also repeatedly contend that under federal law, employers may bargain directly with their employees and give direct promises of job security as long as it is done "outside of any collective bargaining." (Respondents' Br. at 13, 19, 22a-24a.)[4] Respondents, and the Ninth Circuit alike, have ignored the longstanding principles of this Court and the very language of the Act (Section 8(c)) which forbid direct promises of benefits made to employees regardless of the status of collective bargaining. Similarly, respondents, as did the Ninth Circuit, ignore the cases which establish that an unfair labor practice results whenever an employer engages in direct dealing or makes a direct promise of benefit to an employee represented by a union. *See, e.g. Martin Marietta Energy Systems and Oil, Chemical and Atomic Workers International Union*, 283 N.L.R.B. 173 (1987), *enforced*, 842 F.2d 332 (6th Cir. 1988); *Union Carbide Corp.*, 275 N.L.R.B. 197 (1985).

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[4]Respondents mischaracterize Milne's contentions. Obviously not all direct communications with employees are prohibited by the Act and Milne has never suggested this. Direct promises of employment benefits, however, are clearly proscribed. 29 U.S.C. § 158(c).

As the Sixth Circuit explained in *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986), alleged misrepresentations that a plant would remain open made after the conclusion of collective bargaining would nonetheless violate Section 8 of the NLRA, because "the duty to bargain unquestionably extends beyond the period of contract negotiations." *Id.* at 1283.[5] The Ninth Circuit's departure from these precedents, again unacknowledged by respondents, should not go unacknowledged by this Court, and the Court should grant the petition to ensure uniformity of decision.

CONCLUSION

For the reasons set forth herein and in Milne's petition for writ of certiorari, the Court should issue a writ of certiorari to review the decision and judgment below.

DATED: August 31, 1992.

Respectfully submitted,

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[5]Respondents seem to urge that union animus is also a requisite for bad faith bargaining. (Respondents' Br. at 18.) Where, as here, however, the allegations are that Milne bypassed the union entirely until it was "too late" and made individual promises regarding job security, Milne's subjective good or bad faith is immaterial: the allegations amount to a per se violation of the Act as a unilateral change in the collective bargaining agreement, direct dealing or a promise of benefit in circumvention of the union. *See NLRB v. Katz*, 369 U.S. 736 (1962); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *Union Carbide Corp.*, 275 N.L.R.B. 197 (1985).